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IN THE SUPREME COURT FOR THE STATE OF IDAHO

JOEY JAY ATWOOD,

Petitioner-Appellant,

vs.

STATE OF IDAHO, DEPARTMENT OF
TRANSPORTATION,

Respondent.

APPELLANT'S BRIEF

CV-2012-944

Docket No. 40441-2012

APPEAL FROM

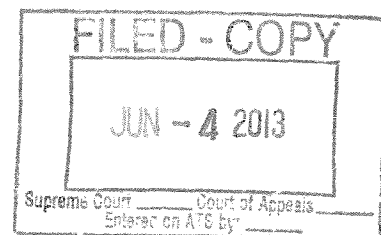
THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE
HONORABLE JOEL E. TINGEY, DISTRICT JUDGE, PRESIDING

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I.

TABLE OF CONTENTS

II.	TABLE OF CASES AND AUTHORITIES	p. 3
III.	STATEMENT OF CASE	p. 4
	I. NATURE OF THE CASE	p. 4
	ii. COURSE OF THE PROCEEDINGS	p. 4
	iii. STATEMENT OF FACTS	p. 4
IV.	ISSUE PRESENTED ON APPEAL	p. 6
	I. MUST THE PEACE OFFICER WHO ADMINISTERED THE DRIVER'S BREATH TEST PROVIDE THE SWORN STATEMENT REQUIRED BY IDAHO CODE §18-8002A BEFORE THE IDAHO TRANSPORTATION DEPARTMENT CAN SUSPEND A DRIVER'S LICENSE?	
V.	ATTORNEY FEES ON APPEAL	p. 7
VI.	ARGUMENT	p. 7
	I. THE PEACE OFFICER WHO ADMINISTERED THE DRIVER'S BREATH TEST MUST PROVIDE THE SWORN STATEMENT REQUIRED BY IDAHO CODE §18-8002A BEFORE THE IDAHO TRANSPORTATION DEPARTMENT CAN SUSPEND A DRIVER'S LICENCE.	
	A. Standard(s) of Review	p. 7
	B. Statutory Construction	p. 8
	C. Statute	p. 8
VII.	CONCLUSION	p. 13

II.

TABLE OF CASES AND AUTHORITIES

A.

CONSTITUTIONS

B.

CASES

<i>Hansen v. State of Idaho</i> , 121 Idaho 507 (1992)	p. 13
<i>Hayden Lake Fire Protection Dist. v. Alcorn</i> , 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005).	p. 8
<i>Hooper v. Hooper</i> , 167 P.2d 761 (2007)	p. 8
<i>In the Matter of Hansen</i> , 121 Idaho 507; 826 P.2d 468 (1992)	p. 10
<i>Kane v. State Dep't of Transp.</i> , 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct. App. 2003)	p. 12, 13
<i>Marshall v. Idaho Dep't of Transp.</i> , 137 Idaho 337, 340, 48 P.3d 666, 669	p. 7
<i>Price v. Payette County Bd of County Comm'rs</i> , 131 Idaho 426, 429, 958 P.2d 583, 586 (1998)	p. 7
<i>State v. Doe</i> , 147 Idaho 326, 328, 208 P.3d 730, 732 (2009)	p. 8
<i>State v. Mills</i> , 128 Idaho 426, 913 P.2d 1196, (Ct. App. 1996)	p. 12, 11
<i>State v. Utz</i> , 125 Idaho 727, 867 P.2d 1001 (Ct. App. 1993)	p. 11, 12

C.

STATUTES

Idaho Appellant Rule 41	p. 7
Idaho Code §18-8002	p. 9
Idaho Code §18-8002A	p. 2, 6, 7, 9, 13
Idaho Code §18-8004(A)(4)	p. 10
Idaho Code §18-8002A(4)(a)	p. 8, 10, 11

Idaho Code §18-8002A(5)	p. 8, 11
Idaho Code §18-8002A(7)	p. 10, 11
Idaho Code §18-8002A(8)	p. 7
Idaho Code §18-8002(5)	p. 10
Idaho Code §18-8002(5)(vi)	p. 10
Idaho Code §18-8004	p. 8, 9, 11
Idaho Code §18-8004C	p. 8, 10
Idaho Code §18-8004(4)	p. 11
Idaho Code §18-8006	p. 8, 9
Idaho Code §49-201	p. 7
Idaho Code §49-330	p. 7
Idaho Code §49-335(4)	p. 10
Idaho Code §67-5201(2)	p. 7
Idaho Code §67-5270	p. 7
Chapter 52, Title 67, Idaho Code Section 67-5270, et. seq.	p. 7
Idaho Code §67-5279(3)	p. 7

D.

RULES AND REGULATIONS

IDAPA, IDLE/ISP SOP 6.2	p. 12
11 IDAPA	p. 11
IDAPA rule 39.02.72 section 200.01	p. 9
IDAPA rule 39.02.72 section 200.01 (b)(c)	p. 11

III.

STATEMENT OF THE CASE

(I) Nature of the case.

This appeal arises from the district court's judgment affirming an administrative agency decision suspending appellant's commercial driver's license for life based on a sworn statement of a peace officer who did not have personal knowledge of compliance with breath testing procedures during appellants breath test administered by another officer.

(ii) Course of proceeding.

A notice of suspension of appellant's license was issued on October 14, 2011 for operating a motor vehicle and failure of evidentiary test for concentration of alcohol. (R. p. 8). Appellant filed a request for administrative hearing before the Idaho Transportation Department (ITD) on October 17, 2011 (R. p. 16).

On October 18, 2011, ITD issued a notice of lifetime suspension of appellant's commercial driver's license. (R. p. 138).

The ITD hearing concluded on January 12, 2012. (R. p. 69). The ITD entered findings of fact and conclusions of law and order sustaining suspension on January 18, 2012. (R. p. 68-80).

Appellant filed a petition for judicial review before the district court on February 15, 2012. (R. 82-84). The district court issued a memorandum decision order, and judgment upholding ITD's decision on September 14, 2012. (R. p. 164-171).

Notice of appeal was filed October 24, 2012. (R. p. 173). An amended notice of appeal was filed November 5, 2012. (R. p. 177).

(iii) Statement of facts.

Appellant, Joey Atwood (Atwood), was cited by Idaho State Police Officer Christopher Lenda (Officer Lenda) for driving under the influence on the 14th of October, 2011. Officer Lenda began the initial investigation but then delegated Atwood's breath test evaluation to

Officer Vance Cox. (R. p. 135).

Officer Lenda did not administer the breath testing procedure. He did not have personal knowledge that all required breath testing procedures were followed. (R. p. 116, L. 7-16, p. 116)

Officer Lenda's sworn statement states that Officer Vance Cox of the Idaho State Police took over the DUI evaluation while he completed the accident investigation. (R. p. 12, par. 1).

During the administrative hearing, Officer Lenda's responded to direct examination by Atwood's counsel as follows:

Q. "Do you recall whether you witnessed both of the breath--Lifeloc portable breath tests that were administered to Mr. Atwood?

A. I don't recall being a direct witness to them, no.

Q. Okay. And you weren't witness to the 15-minute close observation period where a driver is not to eat, drink, belch, or otherwise, during that 15-minute period?

A. No, I was not directly present for that."

(R. p. 116, L. 9-16).

Atwood challenged the statutory sufficiency of the sworn statement based on Officer Lenda's lack of personal knowledge regarding compliance with breath testing procedure. Atwood pointed out that Officer Lenda could not swear that (1) the two breath testing samples were obtained and (2) the fifteen closed observation period occurred which are required under IDLE/ISP breath testing procedure 3.2 and 3.1.4 (R. p. 117, L.20-25; p.118, L1-25).

The ITD hearing officer ruled that the peace officer administering the breath test was not required to submit the sworn statement which the statute requires. (R. p. 150, par.15; p.151, par. 17-18).

IV.

ISSUE PRESENTED ON APPEAL

MUST THE PEACE OFFICER WHO ADMINISTERED THE DRIVER'S BREATH TEST PROVIDE THE SWORN STATEMENT REQUIRED BY IDAHO CODE §18-8002A BEFORE THE IDAHO TRANSPORTATION DEPARTMENT CAN SUSPEND A DRIVER'S LICENSE?

V.

ATTORNEY FEES ON APPEAL

Appellant requests costs under IAR 41 in the event the district court's decision is overturned.

VI.

ARGUMENT

THE PEACE OFFICER WHO ADMINISTERED THE DRIVER'S BREATH TEST MUST PROVIDE THE SWORN STATEMENT REQUIRED BY IDAHO CODE §18-8002A BEFORE THE IDAHO TRANSPORTATION DEPARTMENT CAN SUSPEND A DRIVER'S LICENSE.

A. Standard(s) of Review

Idaho Code §18-8002A(8) provides for judicial review for a driver aggrieved by a decision of the ITD hearing officer in the manner provided for under chapter 52, title 67, Idaho Code section 67-5270 et. seq., which establishes a right to review of a final agency's action before the district court.

"The Idaho Administrative Procedures Act (I.D.A.P.A.) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. See Idaho Code §§49-201, 49-330, 67-5201(2), 67-5270..." *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48, P.3d 666, 669."

A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) **violate statutory or constitutional provisions**; (b) **exceed the agency's statutory authority**, c) are made upon unlawful procedure; d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. Idaho Code §67-5279(3). The party challenging the agency(s) decision must show that the agency erred in a manner specified above and that **a substantial right of that party has been prejudiced**. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669.

As to a question of law, the appellate court "exercises free review to determine whether

the law was properly construed and applied." *Hooper v. Hooper*, 167 P.2d 761 (2007).

B. Statutory Construction

The interpretation of a statute is a question of law over which this Court exercises free review. *State v. Doe*, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). The purpose of statutory interpretation is to ascertain and "give effect to legislative intent." *Id.* Statutory interpretation begins with the literal words of a statute, which are the best guide to determining legislative intent. *Id.* The words of a statute should be given their plain meaning, unless a contrary legislative purpose is expressed or the plain meaning creates an absurd result. *Id.* If the words of the statute are subject to more than one meaning, it is ambiguous and this Court must construe the statute "to mean what the legislature intended it to mean. To determine the intent, [this Court] examine[s] not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history." *Id.* (quoting *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005)).

C. Statute

Idaho Code §18-8002A(4)(a) provides in pertinent part that:

"Upon receipt of the sworn statement of a peace officer that there existed legal cause to believe a person had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances and that the person submitted to a test and the test results indicated an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code, the department shall suspend the person's driver's license, driver's permit, driving privileges or nonresident driving privileges."

Idaho Code §18-8002A(5) states:

"Within five (5) business days following service of a notice of suspension the peace officer shall forward to the department a copy of the completed notice of suspension form upon which the date of service upon the driver shall be clearly indicated, a copy of any completed temporary permit form along with any confiscated driver's license, a certified copy or duplicate original of the results

of all tests for alcohol concentration, **as shown by analysis of breath administered at the direction of the peace officer, and a sworn statement of the officer**, which arrest or incident reports relevant to the arrest and evidentiary testing setting forth: may incorporate any

- (i) The identity of the person;
 - (ii) Stating the officer's legal cause to stop the person;
 - (iii) Stating the officer's legal cause to believe that the person had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code;
 - (iv) That the person was advised of the consequences of taking and failing the evidentiary test as provided in subsection (2) of this section;
 - (v) That the person was lawfully arrested;
 - (vi) That the **person was tested for alcohol concentration, drugs or other intoxicating substances as provided in this chapter**, and that the results of the test indicated an alcohol concentration or presence of drugs or other intoxicating substances in violation of the provisions or section 18-8004 or 18-8006, Idaho Code.
- ...The sworn statement required in this subsection shall be made on the form in accordance with rules adopted by the department."

IDAPA rule 39.02.72 promulgated by the ITD license suspension, section 200.01 reads as follows:

"Forwarding Documents to the Department. Upon service of a Notice of Suspension, a law enforcement agency shall, in accordance with Section 18-8002A, Idaho Code, forward the following documents to the Department within five (5) business days:

- a. Notice of Suspension
- b. **The sworn statement of the officer incorporating any arrest or incident reports relevant to the arrest and evidentiary testing.**
- c. A certified copy of duplicate original of the test results or log **of test results if the officer has directed an evidentiary test of the petitioner's breath.**"

The administrative license suspension (ALS) statute, Idaho Code §18-8002A, authorizes the ITD to suspend the driver's license of a driver who has failed a BAC test administered by a

law enforcement officer and a sworn statement of the officer. The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. Idaho Code §18-8002A(4)(a). If a driver with a commercial driver's license (CDL), has two administrative license suspensions for driving under the influence, the driver's CDL is suspended for a lifetime. Idaho Code 49-335(4). A driver who has been notified of an ALS may request a hearing before a hearing officer designated by the ITD to contest the suspension. Idaho Code §18-8002A(7). At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. Idaho Code §18-8002A(7).

When a driver does not timely request a refusal hearing under Idaho Code 18-8002(4)(C), a sworn statement is required before the court can suspend the driver's license and the sworn statements is a statutory precedent for the court to proceed. *In The Matter of Hansen*, 121 Idaho 507; 826 P.2d 468(1992).

In the present case the ITD did not have the statutory authority to suspend petitioner's license without a proper sworn statement which the statute requires to trigger a suspension. The hearing officer did not have the authority to conduct the hearing as to whether the unlawful suspension should be sustained. And here is why. Officer Lenda could not from his own personal knowledge provide a sworn statement that the petitioners breath test was conducted in accordance with ITD/IDLE/ISP authorized procedure. The Statute provides that a sworn statement of a peace officer must state that a driver has failed an evidentiary test for breath alcohol concentration is required before the ITD can suspend a license. Section 18-8002(A)(4). The express language of the statute provides that the proof of breath alcohol concentration requires a sworn statement of the peace officer who "administered" the test. Section 18-8002(5). The sworn statement of the peace officer who administered the breath alcohol test shall set forth that the person was tested for alcohol concentration...as provided for in this chapter and in form adopted by the ITD. Section 18-8002A(5)(vi). The form adopted by the ITD specifies a sworn statement of the officer and a certified copy of the test results if the officer directed an

evidentiary test of the driver. IDAPA rule 39.02.72 §200.01(b)(c).

As a fundamental matter of statutory construction, the ITD may not suspend a driver's license without a sworn statement of the police officer that a person was driving under the influence under §18-8004 et. seq. see §18-8002A(4)(a).

Under section 18-8004, a person is not chargeable with driving under the influence unless they fail an evidentiary test for alcohol concentration performed under the standards or methods set by the department.

Under Idaho Code §18-8002A(5), a peace officer shall forward to the ITD results of the test "**administered at the direction of the peace officer**" and a "**sworn statement of the peace officer**" that, inter-alia, the person was over the alcohol concentration as "provided for in this chapter."

The sworn statement of the peace officer is the sole evidentiary basis for ITD's suspension as well as the administrative hearing. Section 18-8002A(7) paragraph 3. 18-8002A(4)(a). The statute unmistakably refers to the peace officer's administering the breath test in close proximity to language of the peace officer providing a sworn statement. The only peace officer that can actually and physically swear that the test was performed according to ITD standards is the peace officer who administered the test.

The fundamental requirement for admission of breath test result include compliance with the testing procedures adopted by the Department of Law Enforcement for the operation of breath testing instruments under 11 IDAPA, and Idaho Code §18-8004(4). State v. Utz, 125 Idaho 727, 867 P.2d 1001 (Ct. App. 1993). This includes the S.O.P requirement of the fifteen minute close observation period. Id. Absent a showing of this requirement was met results in the breath test being inadmissible. Id. An officer cannot substitute driving time on the way to jail on a part of the close observation period. Id. Likewise, the peace officer who administered the test cannot substitute the arresting peace officer to give a sworn statement about the prior administration of a breath test.

The requirement of taking two breath samples, like the requirement of the close observation period, is important for two reasons. One is the approved procedure for breath testing generally requires two samples for test validity. IDAPA, IDLE/ISP SOP 6.2. The second is if one of the two tests is below the legal limit, then the driver cannot be prosecuted for DUI. State v. Mills, 128 Idaho 426, 913 P.2d 1196, (Ct. App. 1996).

If the petitioner's BAC test result is below the legal limit, his license cannot be suspended. Mills, supra. If the BAC testing procedure, close observation period, has not been adhered to, the results are inadmissible as a basis for suspending a driver's license. Utz, supra.

The proper peace officer to provide sworn statutory testimony is the peace officer who administered or directed the driver's breath test of Mr. Atwood. A substantial right or privilege to drive and work with a CDL is being adversely affected by the ITD's decision.

In Kane v. State, Dep't of Transp., 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct.App.2003), the Court of Appeals addressed whether the sufficiency of the sworn statement itself was grounds to overturn a hearing officers decision to sustain a suspension if the driver had not proven one of the statutory grounds for having the hearing officer to overturn the suspension. The Court of Appeals ruled against the driver. However, the issue of whether ITD could suspend a driver's license if the initial statutory requirements had not been met was not squarely presented in Kane, supra.

Before a hearing can take place, the ITD must have authority to suspend the driver's license in the first place. The clear structure of the statute, due process, logic, and common sense support this conclusion.

The statutory scheme requires the sworn evidence to be brought forth **before** the Idaho Transportation Department can suspend a drivers license. The Idaho Transportation Department does not have authority to suspend a driver's license without this. Therefore, the inquiry should not be whether petitioner found an error in the breath testing procedure, but whether the Idaho Transportation had the statutory authority to suspend petitioner's license in the first instance. The

legislature specifically chose the officer directing the BAC test as the person to provide a sworn statement of compliance. To read the statute any other way makes this statutory language superfluous. What is the purpose of swearing something important is true if he or she does not know it is true.

Appellant is not merely attacking the form of the officer's affidavit, but the substance required before the Idaho Transportation Department can suspend a drivers license prior to any hearing. In *Hanson v. State of Idaho*, 121 Idaho 507, (1992), the reason the affidavit was not necessary was it was only required if the driver failed to request a timely hearing and the driver had timely requested a refusal. In this case the Idaho Transportation Department cannot suspend a license but upon the sworn statement of the officer directing the test.

Even though the statute lays out the grounds to contest a suspension as discussed in *Kane v. State of Idaho (ITD)*, however, from a purely statutory perspective, the state must have met the foundational requirement that it followed the law before it was given the authority to suspend a license and before a person must contest the suspension.


Since the arresting officer could not swear that all breath testing standards were complied with and the statute requires the officer directing the breath test to do so, the state cannot suspend petitioner's license or require him to contest a suspension which was improper.

VII.

CONCLUSION

ITD's decision as affirmed by the district court violates the statutory language of 18-8002A, exceeds the scope of ITD's statutory authority and adversely affects a substantial right of Atwood, resulting in a lifetime suspension of his commercial diver's license.

DATED this 31st day of May, 2013



Stephen A. Meikle
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on May 31st, 2013, I served a true copy of the foregoing document on the attorney(s)/person(s) listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Attorney(s)/Person(s) served:

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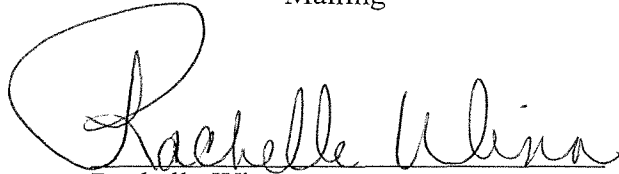
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A handwritten signature in cursive script that reads "Rachelle Winn". The signature is written in black ink and is positioned above the printed name and title.

Rachelle Winn
Legal Assistant